

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JAMES CAREY,

Plaintiff-Appellee,

v

MICKEY SUTER,

Defendant-Appellant,

and

J&M ANGUS, INC.,

Defendant-Not-Participating.

UNPUBLISHED  
September 2, 2004

No. 249283  
Barry Circuit Court  
LC No. 02-000185-CH

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Before: Hoekstra, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

In this breach of contract case, defendant Mickey Suter<sup>1</sup> appeals as of right a \$25,000 judgment entered against him and his company, defendant J&M Angus, Inc. (J&M), following a bench trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I

Plaintiff and defendant were partners and the sole shareholders of J&M, an industrial woodworking and cabinetry business located on Centerline Road in the city of Hastings. In 1999, when animosity between the partners became irreconcilable, plaintiff left the business. Eventually, plaintiff sued defendant in district court for possession of the Centerline building and business equipment.

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<sup>1</sup> Because defendant J&M Angus, Inc. is not participating in this appeal, we refer to Suter as defendant.

In November 2000, the parties reached a settlement agreement, which was reduced to writing signed by the parties and their attorneys. The parties agreed that defendant would vacate the Centerline building and leave certain business equipment in the building. The business equipment was specifically listed in a document entitled “exhibit A,” attached to the agreement. In exchange, plaintiff agreed to relinquish his shares of J&M stock. The district court action was dismissed with prejudice.

Plaintiff obtained access to the Centerline property on December 1, 2000. But most of the equipment listed in exhibit A was not left in the building. Consequently, plaintiff filed a motion in the district court to reinstate the case and void the settlement agreement. In response, defendant objected, arguing that plaintiff’s sole remedy was to sue for breach of contract. At a conference with the district court judge, plaintiff withdrew his motion and thereafter filed a breach of contract claim in circuit court. The district court action remained dismissed with prejudice.

The circuit court action proceeded to trial. At trial, plaintiff testified about the business equipment that, despite the parties’ agreement, was not left in the building. He valued the equipment at approximately \$40,000. Plaintiff’s expert, bankruptcy appraiser Benjamin Kleiman, estimated the equipment to have a fair market value of \$20,700 and a replacement value of \$60,000.

At the close of plaintiff’s proofs, defendant moved to dismiss plaintiff’s claim asserting that it was barred by the doctrine of election of remedies. Defendant contended that because plaintiff elected to reinstate the district court action and void the settlement agreement, he was barred from pursuing the breach of contract action in circuit court. The trial court determined that because plaintiff had withdrawn his motion to void the settlement agreement, he was free to pursue the breach contract claim in circuit court.

In presenting his proofs, defendant conceded that he had not left some of the equipment in the building as agreed, but asserted that he was willing to return the equipment. He further presented testimony that exhibit A did not accurately represent the parties agreement with respect to the equipment. He also asserted that some of the equipment plaintiff sought recovery for was worthless.

The trial court ruled in plaintiff’s favor, finding:

But to boil it down to its simplest, the Defendant here made an agreement with the Plaintiff. The Defendant willfully breached the agreement. My – my impression is – my distinct impression is from listening to all of the witness (sic) that the Defendant essentially stripped the shop of any thing of value to him in his new operation and left the Plaintiff with – with what ever he didn’t want.

Getting to the value of items, Exhibit 5, the appraisal by Mr. Kleiman, in my estimation pretty much represents a distressed sale type of valuation. It doesn’t include any value of the equipment to a going concern. It’s hard to call this a going concern necessarily, but it also doesn’t include any value for the stuff being in place, set up in a shop, which is what it is.

So the finding of the Court is that the property was – under that appraisal was worth 700 -- \$20,700. There were items – some items were returned. I'm placing that at \$700. So basically I have this distressed sale value at \$20,000. I don't think that's necessarily a fair value. Likewise, the replacement cost of \$60,000 would not be fair given the age of the equipment. I don't think that Mr. Cary's appraisal is accurate either. I think that's too high.

The finding of the Court is that the Defendant willfully and intentionally converted Plaintiff's personal property. It's pretty clear he either – he either just – he made an agreement and then totally ignored it, or he – out of reckless disregard of what he and agreed to leave, or he just did it intentionally, knowing exactly what he was doing.

The verdict of the Court is jointly and severally against both Defendants, and it will be for \$25,000.

## II

Defendant first argues that the verdict was not supported by the evidence. We disagree.

We review whether a verdict in a bench trial was against the great weight of the evidence under the clearly erroneous standard. *Amb's v Kalamazoo Co Rd Comm*, 255 Mich App 637, 651-652; 662 NW2d 424 (2003). A trial court's findings are clearly erroneous when, although there is evidence to support them, after review of the entire record, this Court is left with the definite and firm conviction that a mistake has been made. *Id.* This Court gives deference to the trial court's superior ability to assess the credibility of the witnesses before it. *Id.* at 652.

After reviewing the record, we conclude that the verdict was not against the great weight of evidence. Plaintiff presented evidence of the equipment that was missing from the Centerline building. Plaintiff also presented expert testimony on two methods of valuing the equipment and offered his own opinion of the value. Defendant and several of his employees conceded that some of equipment listed in exhibit A was not left in the building, but also contested the value of some of the equipment. The trial court weighed the evidence and reached verdict, which was supported by the evidence. Although damages based on speculation or conjecture are not recoverable, damages are not speculative merely because they cannot be ascertained with mathematical precision. It is sufficient if a reasonable basis for computation exists. *Berrios v Miles, Inc*, 226 Mich App 470, 478; 574 NW2d 677 (1997). Therefore, we conclude that the trial court's verdict was not against the great weight of the evidence.

## III

Defendant also argues that the trial court erred in denying his motion to dismiss plaintiff's action on the basis that the election of remedies doctrine precluded plaintiff from pursuing a breach of contract claim when he filed a motion in the district court to void the settlement agreement and reinstate the action. We disagree. Because the election of remedies doctrine, in the context of this case, is "merely a procedural rule," *Riverview Co-op, Inc v The First Nat'l Bank and Trust Co of Michigan*, 417 Mich 307, 311; 337 NW2d 225 (1983); *Jim-*

*Bob, Inc v Mehling*, 178 Mich App 71, 91; 443 NW2d 451 (1989), this issue presents a question of law that we review de novo.

The election of remedies doctrine applies only if three prerequisites are satisfied: (1) the existence of two or more remedies, (2) the inconsistency between such remedies, and (3) a choice of one of them. *Riverview*, *supra* at 313, quoting *Ielmini v Bessemer Nat'l Bank*, 298 Mich 59, 66-67; 298 NW 404 (1941). The purpose of the doctrine is to prevent double recovery for a single injury and not to prevent recourse to alternate remedies. *Id.* at 312; *Jim-Bob*, *supra* at 91. A plaintiff may simultaneously pursue all available remedies regardless of legal consistency, as long as the plaintiff is not awarded a double recovery. *Jim-Bob*, *supra* at 92, quoting *Walraven v Martin*, 123 Mich App 342, 348; 333 NW2d 569 (1983).

The trial court did not err when it denied defendant's motion to dismiss plaintiff's claim based upon the election of remedies doctrine. Although plaintiff filed a motion in the district court to reinstate the case and void the settlement agreement, plaintiff withdrew his motion before the district court ruled on it. Plaintiff thereafter filed a claim in the circuit court alleging that defendant breached the settlement agreement. Because the district court action remained dismissed with prejudice when plaintiff pursued the circuit court action, plaintiff pursued the circuit court remedy to the exclusion of the district court remedy. Under these circumstances, plaintiff did not have a choice between two inconsistent remedies and there was no danger of plaintiff obtaining a double recovery. The only remedy plaintiff pursued was enforcement of the settlement agreement in circuit court.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Jessica R. Cooper  
/s/ Kirsten Frank Kelly